
Volume 41

Issue 4 Summer 1992: *Symposium - Employment
Discrimination, Affirmative Action, and
Multiculturalism*

Article 5

The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss

Richard A. Epstein

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Richard A. Epstein, *The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss*, 41 DePaul L. Rev. 1041 (1992)

Available at: <https://via.library.depaul.edu/law-review/vol41/iss4/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

THE AUTHORITARIAN IMPULSE IN SEX DISCRIMINATION LAW: A REPLY TO PROFESSORS ABRAMS AND STRAUSS

*Richard A. Epstein**

INTRODUCTION

The papers of Professors Kathryn Abrams¹ and David Strauss² represent the stock responses to my basic position outlined in *Gender Is for Nouns*.³ While both Professors Abrams and Strauss recognize that some reform of current antidiscrimination law might be in order, they do not specify what shape such reform might take; but, by the same token, they do reject as precipitate and unwise my recommendation that the entire structure of the employment discrimination laws be dismantled, at least insofar as it applies to private employers. I think that a careful consideration of their arguments should lead the disinterested reader to the opposite conclusion: that the case for keeping the sex discrimination law is far weaker than even I had imagined.

In order to support this conclusion I shall consider four separate topics raised by their two papers. The first is the nature and nurture dispute, and its relationship to social policy. The second is the meaning of that elusive term *socially constructed*. The third addresses the reasonable woman standard in sexual harassment cases, and the fourth the relationship between an antidiscrimination norm and the affirmative action principle. In this connection I also note the striking parallel between the arguments used in defense of the antidiscrimination laws and those once used in defense of socialism more generally.

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago. I should like to thank Jay Wright for his valuable and energetic research assistance in the preparation of this article.

1. Kathryn Abrams, *Social Construction, Roving Biologism, And Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021 (1992).

2. David A Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007 (1992).

3. Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981 (1992).

I. NATURE AND NURTURE, AND WHAT TO DO ABOUT THEM

Professors Abrams and Strauss both initially challenge the relationship between the nature and nurture distinction and the operation of employment markets. My basic position was, and is, that if men and women on some systematic basis bring different attributes to the employment market, then we should expect to find a voluntary sorting by position, and within firms, that reflects underlying concerns with productivity, and not the invidious operation of some system of social or employer exploitation.⁴

The initial counterargument to this position offered by Strauss is that the relevant line of distinction is not that between nature and nurture, but the distinction between those changes in behavior that are hard to make and those that are easy to make. It is possible, he notes, that biological differences will fall as easily into the category of changes easy to make as they will into changes difficult to make, and that environmental differences (one need think only of disabilities brought on by accidents) will be difficult to overcome.⁵ There are in effect four possible cells: biological/difficult to change, biological/easy to change, environmental/difficult to change, and environmental/easy to change. Professor Strauss's criticism, and it is surely true, is that none of these cells are empty. His illustration of near-sightedness as a biological change easily corrected by glasses (one wishes that it were always so simple!) is treated as evidence of the irrelevance of the nature-nurture distinction.

His whole enterprise is misguided because of what it fails to establish. The issue here is not whether all four cells are filled—they surely are. Instead a whole range of questions are relevant: one is whether the first cell, biological/difficult to change, is empty—which it surely is not. In order to defeat the thrust of my basic argument it is not sufficient for Strauss to show that there are multiple causes of the behavioral and attitudinal differences between men and women. He must use this new information to *deny* that there are any sex-linked characteristics, biological in origin, that could prove important in employment markets. The evidence of the major differences, while often difficult to appreciate and difficult to change, has been documented far more exhaustively than in my ini-

4. See *id.* at 995; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS chs. 13-14 (1992).

5. Strauss, *supra* note 2, at 1008-09.

tial paper, and nothing that either he or Professor Abrams says undercuts their importance.⁶ IQ tests, for example, show strong sex-linked characteristics, even if the median scores are the same for males and females: The indices have been so defined that the persistent differences between the sexes—differences that cut in both directions—are made to even out.⁷ It is not possible to ignore these differences simply because other differences should be taken into account. And they are more relevant for this inquiry precisely because they, and not environmental differences, bear on the question of whether market behaviors are subject to biological influences. The presence of multiple sources of sex differences only shows how difficult it is for crude regulatory schemes to impose intelligent controls over market behavior.

Professor Strauss has yet another line of defense, namely that the two relevant questions in the nature-nurture controversy are, What are the costs of overcoming natural differences? and, What is the moral case for overcoming them? In this his concern is echoed by Professor Abrams who attacks any “unreflective association of the ‘natural’ with the normative.”⁸ But these two questions are not wholly separate from the question of the magnitude of the biological differences: If they are large, then we now have explanations from the *employee* side of the market as to why men and women tend to pursue different career paths. It is therefore far more difficult to make out the common claim that discrimination *against* women is based on invidious or irrational forces. Instead it becomes more plausible to argue that the discrimination *between* men and women works to the advantage of both. If one root of occupational differences is biological, then we cannot treat these differences as the fault of any group whom the law should seek to punish or even correct. Instead there is strong confirmation that the social costs of their “correction” will be great because the preferences in question are both powerful and ingrained.

The biological evidence should be relevant therefore even under

6. For an exhaustive summary, see Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617 (1984).

7. See *id.* at 621-22; LEE WILLERMAN, *THE PSYCHOLOGY OF INDIVIDUAL AND GROUP DIFFERENCES* 388 (1979).

8. Abrams, *supra* note 1, at 1027. As for the basic philosophical point, I need only repeat one sentence from my earlier paper: “The judgment of whether certain acts are, or should be, allowable is in the end always social, no matter what one’s view of human nature.” Epstein, *supra* note 3, at 994.

the current disparate treatment standard, which, as Professor Strauss tells us, allows differences in outcomes to survive in the marketplace "so long as gender was not in any way the basis of the employer's actions."⁹ In contrast, "[t]he disparate impact standard does impose some limits on outcomes, but subject to a business necessity defense; that is the employer need not equalize outcomes if it would be too costly to do so."¹⁰ In both these cases, biological evidence will have a role to play. Where there are biological differences in preferences by employees, the mere fact of employee preference negates the plaintiff's evidence that sex was "the," or even "a," basis in the employment practices. And where biological differences are substantial, it shows the costliness of steps necessary to overcome them, although rarely to the level of business necessity as the law is commonly construed today.

In light of the pervasive nature of the cost question, it is difficult to imagine *any* moral theory holding that the greater the natural differences between men and women, the more that should be done to root them out from employment settings. Instead the demand for social reconstruction, like the demand for anything else, should decrease as the cost of the proposed changes increases. Professor Strauss's recourse to the importance of collective decisions does nothing to offer any justification for his program. The very existence of sex differences offers the potential for gains from trade for both men and women, and the insistence that these differences be overcome by an antidiscrimination law does not explain why anyone should favor a legal reform that leaves both groups *worse off* than they would have been if market forces had been allowed to operate in job selection.

To be sure, Professor Strauss makes the predictable response that

9. Strauss, *supra* note 2, at 1015. This summary simplifies the basic issues because it ignores the many cases of joint and mixed motivation, where the law is far more complex. See generally Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed-Motive Discrimination*, 68 N.C. L. REV. 495 (1990). The Civil Rights Act of 1991 clarifies the burden each party bears in mixed-motive cases. To make out a violation, a plaintiff must establish that an employer's decision was motivated by one of Title VII's forbidden criteria (sex, race, etc.). Once a violation is established, the employer may limit the plaintiff's relief by showing that its decision would have been the same even without the presence of the forbidden factor. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(B) (1988 & Supp. III 1991)).

10. Strauss, *supra* note 2, at 1015. His version of the defense takes much of the sting out of the present law, which often distinguishes business necessity from mere convenience, setting therefore a very high threshold for cost justifications.

we cannot rely on markets to correct the initial errors in distribution, if such there be.¹¹ But in so doing he misses the familiar and decisive reply. Even if the initial distribution is suspect, nothing is gained by preventing voluntary exchanges that work Pareto improvements. At best his argument calls for a one-time lump sum transfer payment from men to women, or perhaps even for a differential rate of taxation on men's and women's income to reflect the inequity that he perceives in the initial position. But I doubt that he could defend either proposition on its own terms, especially since the various forms of government regulation often work capricious redistributions within classes (that is, from some women to other women), no matter what their ostensible intentions. It is one thing to insist that there are moral and normative issues that must be taken into account once factual differences are identified. It is quite another thing to show that these differences justify the complex and costly set of antidiscrimination laws that are now on the books. For all his insistence on the moral point, Strauss offers us *no* argument on the factual issues.

Professor Strauss also pursues another theme: He contends that the existence of unregulated employment markets create negative externalities sustained by the victims of discrimination. Here in effect the position is that discrimination should be regarded as a tort, akin perhaps to the tort of assault,¹² because of the harm that it does to "women's self-respect, social status, and freedom from dependency."¹³ The response is odd for a set of laws that treat women as a protected class, with the implication that they cannot make it on their own in the workplace. To speak the language of "independent income or employment opportunities"¹⁴ is to use libertarian language to support a statute that constitutes the very antithesis of

11. "The well-known problem with the Kaldor-Hicks criterion is that it is not plausible as a standard for evaluating the justice of social institutions generally. The principal reason is that it ignores distributional concerns." *Id.* at 1016.

12. He takes this position explicitly in David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991). The analytical differences between an assault and a private refusal to deal, for whatever reason, are developed at length in EPSTEIN, *supra* note 4, at 29-31. His piece argues for nationwide quotas in all occupations—a disastrous prescription that promises to bring the entire economy to a grinding halt. Cf. John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1734 (1991) (criticizing Prof. Strauss's quota proposal on the ground that it is based on a view of race discrimination wholly lacking in empirical support).

13. Strauss, *supra* note 2, at 1016.

14. *Id.* at 1017.

self-sufficiency and freedom of opportunity. One can quite agree that these indirect effects and soft externalities should be taken into account. But if so, then they all should be counted, including the demoralization effects that the antidiscrimination laws have on groups who are disadvantaged by them. In principle, it should be shown that the control of these negative externalities is so important that it outweighs the economic inefficiencies, demoralization costs, and administrative costs brought on by Title VII. Professor Strauss not only fails to do this, he fails even to show that his ragtag collection of soft externalities, taken together, cut in his favor.

Professor Abrams pursues this same theme, but in a discussion of my brief treatment of breastfeeding,¹⁵ which was only designed to note that the relative abilities and preferences of men and women differ in both the family and employment sphere. She is correct to point out that today women can avail themselves of many substitutes for breastfeeding, and that there is no reason at all for women to chain themselves to their children if they wish to do otherwise.¹⁶ But she does not understand that evolutionary pressures continue to exert their influences today, even if the circumstances that generated these pressures have long since passed from the scene. Of course Professor Abrams is correct in insisting that freedom of choice in styles of parenting is something that any open society should protect. But what is wholly missing from Professor Abrams' account is the recognition that any woman would *want* to alter her professional life in order to breast feed, as many do. Nor does she think it possible that the set of emotions that lead some women to breast feed might influence the behavior and sentiments of other women who decide to forgo or curtail that opportunity in order to return to the workplace. She has a far too rigid and compartmentalized view of the mainsprings of human behavior. Once the patterns of parent bonding, which begin before birth, differ between men and women, then we should expect on average that they will have different attachments to the workplace. I take it (without citation) that the number of women lawyers who decide to leave or cut back on their careers, either permanently or temporarily, to nurse or to raise their children is very large. I regard these as perfectly responsible and laudable choices, although obviously not the only ones that can be made. The initial argument in the paper is therefore sound: Dif-

15. Epstein, *supra* note 3, at 990.

16. Abrams, *supra* note 1, at 1024-25.

ferences in natural endowment will lead to differences in employment behaviors. We should not expect matters to be otherwise.¹⁷

Professor Abrams fears that I enjoy covert membership in that hardy band of sociobiologists "who begin with Darwin and 'extrapolate from the species to the individual and from physical characteristics to psychological ones.'"¹⁸ But test my position against her criteria. I have not made the leap from the group to the individual. Instead I have said that in large populations, systematic differences between men and women will occur, which is surely consistent with some men having a greater preference for nurturing activities than most women, even if the norm is the other way. And I am quite willing to insist with Darwin and the modern sociobiologists that the theory of natural selection applies to the emotions and other psychological states with as much force as they do to physical characteristics. Does anyone think that the emotion of fear is designed to bring us closer to objects that cause our destruction? Or that it has no survival value in stimulating either defense or flight? It would be a truly amazing world if Professor Abrams were correct and psychological states were utterly independent of biological influences.

II. SOCIAL CONSTRUCTION: DOES ANYONE KNOW WHAT IT MEANS?

Professors Abrams and Strauss also take me to task for my attack on the common assertion made by feminists and others that social reality is often socially constructed. In part they are uneasy about pursuing this line of attack because they are uncertain themselves exactly what the phrase means—which is a good reason to avoid it in one's own work. In my view, the words mean exactly what they say: *constructed* is used in opposition to *found* or *discovered*, so that differences between men and women are thus made. But by whom? *Socially* suggests that it is through a collective pattern of acculturation in which we all participate, for which we are all in some sense responsible, and which is not seriously constrained by biological elements. *Socially constructed* is thus used in opposition to "either

17. For a more extensive development of this position, see Richard A. Epstein, *The Varieties of Self-Interest*, 8 SOC. PHIL. & POL'Y 102 (1990).

18. Abrams, *supra* note 1, at 1025 (quoting CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER* 47 (1988) (citing CAROL TAVRIS & CAROLE WADE, *THE LONGEST WAR: SEX DIFFERENCES IN PERSPECTIVE* (2d ed. 1984))). The target of this criticism is EDWARD O. WILSON, *ON HUMAN NATURE* (1978).

mirroring or being determined by nature."¹⁹

The clear implication of this position is that since we do not like the reality that we see—because it places men in dominant positions over women—then we should take conscious and purposive steps to reshape that reality in a new collective image. In part those changes could come through alteration of traditional habits of interaction, which, if done *without* the coercive power of the state, may be all for the good—so long as all of us are entitled to urge that form of social conduct that we regard as appropriate. But for the defenders of Title VII social persuasion, “open to all” is not good enough. In their view it becomes possible and necessary to use the force and might of the state to reconstruct society to conform with their views of what is morally and socially just. The authoritarian impulse that lurks behind the conception, and its dangerous consequences, are not softened by its benevolent motive.

Both Professors Abrams and Strauss protest my stark characterization of *socially constructed*. Professor Strauss, for his part, gives the term a meaning that drains it of all its punch: “The term ‘socially constructed’, as I understand it, means not that the characteristics in question are literally created by society but that the decision what to do about them is one that society can make.”²⁰ On this question of usage, his innocuous interpretation stands quite alone. Out of curiosity I had run a LEXIS search of the *Harvard Law Review*, the *Yale Law Journal*, and the *University of Chicago Law Review* for the past several years on the words *socially constructed*. Not one instance of those found bears any resemblance to Professor Strauss’s peculiar definition of the phrase.

Here is a brief sampling. The late Mary Jo Frug in the *Harvard Law Review*: “Most feminists are committed to the position that however ‘natural’ and common sex differences may seem, the differences between women and men are not biologically compelled; they are, rather, ‘socially constructed.’”²¹ Vicki Schultz in the *Harvard Law Review*: “[T]he story portrays gender as so complete and natural as to render invisible the processes through which gender is socially constructed by employers.”²² Cass Sunstein in the *Harvard*

19. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240 (1987).

20. Strauss, *supra* note 2, at 1011.

21. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048 (1992).

22. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex*

Law Review: "MacKinnon claims that gender relations, like the common law and racial practices, are regarded as natural or pre-political but are actually socially constructed, alterable, and unjust."²³ And again by Sunstein: "MacKinnon responds that sexuality is to a large degree socially constructed for both men and women."²⁴ Frances E. Olson in the *Harvard Law Review*: "By 'gender system' I mean the system wherein male and female are socially constructed as correlative opposites that form a dichotomy in which males are hierarchically superior to females."²⁵ Robin West in the *University of Chicago Law Review*: "The longing [in men] to overcome alienation is a socially constructed reaction against the natural fact of individuation."²⁶ Mari J. Matsuda in the *Yale Law Journal*: "The way in which linguistic patterns are seen as natural rather than socially constructed is evident in judicial opinions."²⁷ Nancy Ehrenreich in the *Yale Law Journal*: "Pornography is simply the most obvious example of a whole range of mechanisms through which women are socially constructed as sexual objects."²⁸ And so on.

Professor Strauss's usage is the clearly aberrant. On one reading, however, it is wholly harmless, because even persons who believed that *all* personality traits are biologically determined could insist that the question of social responses to biological differences are always subject to human deliberation. His further assertion suggests that something more ominous is afoot: The use of the term is not designed to negate the fact of biological differences, rather "it is to assert that the social significance of those differences is something that is ultimately subject to *collective* decision."²⁹ But why? Given this definition, we have here an utterly untested and unjustified case

Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1805 (1990).

23. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829-30 (1988) (book review). The connection between the biological and the alterable should be evident.

24. *Id.* at 843.

25. Frances E. Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1572 n.274 (1983).

26. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 41 (1988).

27. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394 n.229 (1991).

28. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1197 n.75 (1990).

29. Strauss, *supra* note 2, at 1011 (emphasis added). It is worth noting that every user of the term is to the left of center on the question of markets versus regulation, at least in areas where they think that social construction applies.

for massive social thought control that is utterly inconsistent with any respect for freedom of speech, religion, or conscience. Unfortunately, Professor Strauss does not explore any of the implications of his chilling general statement about the importance of right thinking, but instead lapses off into an innocuous example which says that the fact that men are stronger and more aggressive could in certain situations be a liability instead of an asset. And so it is, on any theory, including a libertarian theory that calls for a prohibition on the use of force and respect for freedom of association.

Professor Strauss also takes a different tack and notes that feminists often fall into two camps: those who reject the idea that there are any important sex differences and those who insist that these "real differences" matter. I am of course aware of these two strands of thought, and wish only to point out the unfortunate trend in the social dialogue. Persons like myself are not supposed to point out sex differences in order to argue on behalf of open markets. But feminists are allowed to point out these differences, either to claim the moral superiority of women or, in the alternative, as a justification for certain social interventions that will offset any natural disadvantages they suffer. It thus becomes a "can't lose" situation for them and a "can't win" situation for everyone else. The list of authors quoted above surely contains no friend of free markets in matters where social construction controls.

Professor Abrams follows the general pattern of believers in social construction. She acknowledges her own coercive agenda of legal enforcement. In her view, it is important to recognize the limits of "equality" theory, which has treated discrimination as episodic and irrational, and which therefore has concentrated on opening up the workplace to women.³⁰ In her view, that form of intervention has proved insufficient because it "fails to address those forms of discrimination that arise from neglect or devaluation of women's differences."³¹ Now the effort is to overcome entrenched attitudes, to compensate for differences in parenting style and the like. I have not the slightest doubt that self-interested employers will have strong incentives to accommodate the differences between men and women *on mutually beneficial terms* if freed from the shackles of Title VII. But Professor Abrams, true to her own authoritarian impulses, regards voluntary adjustments as insufficient for her task. Instead the

30. Abrams, *supra* note 1, at 1029-30.

31. *Id.* at 1030.

law must now be used as a weapon to force employers to "accommodate women, not simply admit them."³² She then launches into a comprehensive statement about the programs that she thinks might achieve this goal without once asking whether or how a system of government ukases can do better than a system of voluntary arrangements.

To mention but one example, she writes: "A statute requiring maternity leave, for example, might contain legislative history describing the importance of family in the lives of many women, the costs of work/family conflict for workers who are mothers, or the prevalence of mothers as primary care providers."³³ But hers is a bad legislative history in support of a bad statutory idea. It ignores all the costs that might be inflicted on employers who have to make do with temporary substitutes during a period of absence, and who are thus left far worse off than they would otherwise be, even when the woman takes an unpaid leave. Professor Abrams also ignores the loss of opportunities for other women who want to return to the workplace and find their opportunities blocked by women who have safe positions under the statute. And she overlooks the obvious fact that many firms are, without any statute, willing to give voluntary maternity leave to many women. Her insistence that a maternity leave program is a good idea waiting for enactment tells us all too clearly what *socially constructed* means: massive coercion by the state in support of dubious schemes of social control that could never earn their place in an open market.

III. SEXUAL HARASSMENT AND THE REASONABLE WOMAN

The last portion of Professor Abrams' paper is not directed towards the arguments I made in *Gender Is for Nouns*, but instead deals with the general issue of sexual harassment, on which she has previously written.³⁴ These earlier writings took the position that sexual harassment cases should be evaluated from the perspective of the reasonable woman, and how she should be expected to respond to behavior by a sometime unreasonable male. That position, which rejects both the perspective of the reasonable man and the reasonable person, has been adopted in at least one judicial opinion, which

32. *Id.*

33. *Id.* at 1031.

34. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

cited Professor Abrams' work.³⁵ Now Professor Abrams rightly has some uneasiness with her position. It is not that she wishes to return to the earlier standards that contain what she perceives as a male bias. It is that she thinks her own standard might well contain bias in favor of white, middle-class, heterosexual women, as opposed to working-class women, lesbians, and women of other races and colors, for whom the standards of acceptable conduct might be different.

I have no doubt that Professor Abrams is correct to be uneasy about her earlier position, for there is no evident reason why a single standard of sexual harassment should fit all cases, given the enormous variation in situations to which that standard has to apply. But Professor Abrams does not take her skepticism quite far enough. The variation that she sees among the classes of women also carries over to the classes of firms in which they work, and the appropriate standards of conduct for them. An employer has all the incentives to set the right standards for each workplace. If the standards are made too stringent, then honest workers, fearing false charges, will shy away from the firm; if they are made too lax, then able women will choose to work elsewhere. There are no externalities in this setting, and no reason to believe that a single dictate imposed by the courts or under Title VII will begin to be serviceable in the many contexts to which it applies. Again a contract solution is superior to a regulatory one, whether it allows for compensatory damages or administrative relief. Professor Abrams' good common sense allows her to see the difficulties in her earlier work, but her regrettable bent toward statist solutions forces her to miss the proper solution to what has been, and will doubtless remain, an important social problem.

IV. NONDISCRIMINATION AND AFFIRMATIVE ACTION

Professor Strauss also takes this occasion to raise another theme to which he has a great partiality.³⁶ He argues that there is really

35. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). *Ellison* illustrates some of the difficulties in the coordination of Title VII with ordinary labor law. The plaintiff's co-employee, Gray, at the IRS was initially transferred to another office after the plaintiff had filed her grievances about the "weird" notes and letters that Gray had sent her. But the co-employee filed a union grievance and was ordered reinstated at his initial office on condition that he not "bother" the plaintiff. Management in a nonunion environment is clearly better able to respond to harassment claims than management that is so constrained.

36. Strauss, *supra* note 2, at 1019.

no ironclad distinction between the antidiscrimination principle and the affirmative action principle. If therefore there is widespread acceptance of the first (and there is no doubt that there is), then likewise there is no legitimate ground on which to oppose the second. Just as the obligation to avoid discrimination can be imposed under the present law by government edict, the same is true of affirmative action programs. The full regime of the modern civil rights movement is therefore faithful to the original promise of the Civil Rights Act of 1964.

Professor Strauss here tries to win an important social debate by a slippery form of deductive argument, not worthy of the traditional Oxford Ordinary-Language philosopher. But his point simply will not work once the ambiguity in the idea of the nondiscrimination principle is laid bare. As I argued in *Gender. Is for Nouns*, the original defenders of the antidiscrimination laws were confident in their judgment about the efficacy of the antidiscrimination laws. They believed that they could eat their cake and have it too. In their view, the market was pervaded with irrational excesses that distinguished on grounds of race, and by implication, on grounds of sex as well. They believed that it was possible to remove these excess influences from the employment process, and thereby allow decisions based on merit to come to the fore. They had before them the precedent of the Equal Pay Act of 1963,³⁷ which enshrined into statute the idea of equal pay for equal work, whose soundness remains an article of faith for the vast number of Americans of all political parties and persuasions.

These early developments in civil rights law were not pleas for disguised subsidies for women in the workplace. Could one imagine any advocate of the Equal Pay Act defending the statute on that ground in 1963? Or even today? And could anyone imagine a defense of the Civil Rights Act of 1964 on the ground that it gave hidden subsidies to protected classes—itsself a conception that only worked its way into the literature long after Title VII went into effect in 1965. Although no one thought about the question at all, imagine anyone defending the statute on the grounds of justice and claiming the following: Workers of groups A and B both produce value of 100. The collateral costs to the employer (equipment, insurance, morale, etc.) for members of group A are 80, and the collat-

37. 29 U.S.C. § 206(d) (1988).

eral costs to the employer for members of group B are 60. Therefore the wages of the two groups, if identical, should be 30 (100-70). If those wages were calculated separately, those of the men should be 40 and of the women 20 for the firm to be indifferent between them. Surely the subsidy of A by B is clear, and the correct definition of *discrimination* requires some differential wage (equal here to 20) to offset the differential collateral costs. Markets will tend to make those adjustments, which regulators will systematically suppress, as they now do under current law. Once this grotesque, cost-free definition of *discrimination* is treated as the principle enshrined in the Civil Rights Act of 1964, then of course affirmative action involves the same principle as nondiscrimination. One gives a subsidy by ignoring differential costs, and the other (in its pure form at least) gives higher wages or other preferences to the members of group B when their productivity is no greater than that of group A. The two principles of differential costs and differential benefits can of course be mixed and matched at our pleasure, so long as we know what they entail: equal wages for unequal work, and unequal wages for equal work.

Strauss's topsy-turvy world is a far cry from the original conception of the antidiscrimination principle, and for all I know there may be many firms that profit from its adoption. But his program that equates nondiscrimination and affirmative action is not a program for voluntary action. It is a program of public coercion, based on little more than a regrettable verbal equivocation in the meaning of the term *discrimination*. His misguided cleverness should give us pause to believe that any legislative or judicial commitment to combat discrimination in the workplace could be faithful to its own mission. The beneficiaries of a sex-blind standard in employment discrimination will abandon it at the drop of a hat when it no longer provides them an advantage. There is no stable political equilibrium to support any "blind" antidiscrimination principle, and enacting any such principle into law will only lead to the present double standard, whereby government seeks endlessly to combat all forms of discrimination, real or imagined, against its favored groups, while actively forcing or inducing discrimination in their favor.

V. CONCLUSION

This constant expansion of government roles in employment markets should be understood for what it is—another effort to manage

an economy from the center. Nearly fifty years ago, in the *Road to Serfdom*,³⁸ the late and great Friedrich von Hayek warned against the “fatal conceit” of central planning of the economy. The center can never get enough information to make intelligent choices and comparisons of resource use. He spoke of this issue in the grand context of socialism when it was understood not merely as some affirmation of certain welfare rights—housing, health, education, and the like—for all citizens, but, more boldly, as the collective ownership of the means of production. The employment discrimination laws do not purport to make the government the sole employer of all workers, but they do seek to establish a single set of contract terms for all employment relationships. It is a large slice of central planning, with regulation as the hidden proxy for government ownership.

It is, I think, more than a mere historical curiosity to watch the parallel evolution in the arguments in favor of an extensive government role, first in the control of the means of production and now in employment regulation. The early socialists thought that socialism could eliminate the wasteful aspects of market competition and lead to a system that produced greater material satisfaction for its citizens. The moral premise behind the system was, however odd it might seem today, a kind of wealth or utility maximization. The abject failures of the program in practice has led its European defenders to abandon the system and to work for a belated transformation to some (qualified) market system. But the American socialists have not learned the lesson. So they continue to defend a system of extensive government intervention on the ground that it is necessary to overcome inequalities of wealth within society, to provide basic minimum rights—education, welfare, health care—that markets supposedly cannot provide. The defenses are rarely based on the productive efficiency of any government system: Distributional questions, psychological concerns, and dignitary benefits lie at the root of their argument.

The civil rights movement has witnessed a similar scaling down of its expectations. The rhetoric of the 1960s was the rhetoric of equality of opportunity and economic progress; it was the rhetoric of a system confident that it could beat the market at its own game by unleashing the productive forces of society that had been kept in check too long by ignorance and prejudice. But what Hayek said

38. FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944).

about central planning in the round also applies to central planning in employment markets. Now that it has become clear that the civil rights laws cannot achieve those lofty ends, that we live in an age of limits and economic anxiety, the rationales for them have shifted to reflect the new set of reduced expectations. We are told that these laws advance individual dignity, that they subsidize worthy recipients and protected classes, and that they guarantee minimum rights. No mind that they will fail in these more modest tasks as they failed in their original and grander mission. The elaborate rhetoric of social reconstruction and self-realization, of marginalization and devaluation, will pour forth in vast quantities to support a legal program that at its root has become yet another authoritarian exercise, another botched and misguided form of central planning. We may not be able to stem the rhetoric, but we should repeal, and repeal now, the statutes that have become the focal point of the authoritarian intellectual mindset represented by Professors Abrams and Strauss.